In the Supreme Court

OCTOBER TERM, 1915

No. 396

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE ROTH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

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To the United States Circuit Court of Appeals
For the Sixth Circuit.

The petitioner, The Pennsylvania Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on July 14, 1947, affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 164) is not reported. The opinion of the Circuit Court of Appeals (R. 175-180) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 14, 1947. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended. 28 U. S. C. § 347 (a).

STATUTE INVOLVED.

Section 1 of the Federal Employers' Liability Act, as amended, is copied in the Appendix.

QUESTION PRESENTED.

In the circumstances of his injury, was respondent an "employee" of or "employed" by the Railroad within the meaning of those terms as they are used in Section 1 of the Federal Employers' Liability Act?

STATEMENT OF FACTS.

This case involves an attempt by respondent, an employee of Fritz-Rumer-Cooke, to recover under the Federal Employers' Liability Act as an employee of petitioner, the Railroad.

On the afternoon of August 21, 1945, respondent, who was employed by Fritz-Rumer-Cooke (R. 36, 61), was engaged at a Government storage yard near Crestline, Ohio, with two other employees of Fritz-Rumer-Cooke (R. 52, 63) under the supervision of Fritz-Rumer-Cooke's superintendent (R. 61, 74-75), in loading a crane on a railroad flat car (R. 63). The crane was the property of Fritz-Rumer-Cooke and was being shipped by Fritz-Rumer-Cooke to its own storage yard in Columbus, Ohio (R. 58). A car inspector of the Railroad was present during the loading operations to accept or reject the car for transportation, that is, to determine whether or not the loaded car complied with the loading rules of the Association of American Railroads (R. 58, 75, 85, 87).

Respondent was injured when a bar, which had been used to twist and draw taut a cable securing the crane to the railroad car, slipped and struck him in the eye (R. 63-67). As an employee of Fritz-Rumer-Cooke, respondent thereupon sought and obtained from the Ohio Industrial Commission a full workmen's compensation award in the amount of $2,625.00 and the payment of medical bills in the amount

of $250.00 (R. 46). Thereafter, respondent brought the present action against the Railroad. In his complaint, respondent claimed in the alternative either that he was an "employee" of the Railroad and entitled to the benefits of the Federal Employers' Liability Act or that he was an invitee of the Railroad and entitled to recover on conventional common law negligence principles (R. 2-4). The cause of action grounded on the Federal Employers' Liability Act proceeded on the theory that a contract between the Railroad and Fritz-Rumer-Cooke (Ex. 9, R. 131-138) had the effect of making respondent an "employee" of the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act.

At the close of all of the evidence, the Railroad made separate motions for a directed verdict in respect of each of respondent's causes of action (R. 91). The District Court sustained the motion in respect of the second cause of action (R. 105) and dismissed it, but overruled the motion addressed to the cause of action under the Federal Employers' Liability Act (R. 105). The Court then instructed the jury that as a matter of law respondent was an "employee" of the Railroad and submitted the case to the jury on that theory (R. 105, 107-115). The jury returned a verdict for the respondent. The Court overruled the Railroad's motion in the alternative for judgment notwithstanding the verdict or for a new trial (R. 163-165), and entered judgment for respondent. From this judgment the Railroad appealed to the Circuit Court of Appeals which affirmed the judgment of the District Court (R. 173). The respondent did not appeal from that part of the Court's order which dismissed respondent's cause of action grounded on the theory that he was an invitee of the Railroad, and the question of the Railroad's liability in this respect is therefore not in issue before this Court.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that as a matter of law respondent was an "employee" of, or was "employed" by, the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act.

2. In failing to hold that the contract or relationship between the Railroad and Fritz-Rumer-Cooke was neither relevant to nor determinative of the question of the Railroad's liability to respondent under Section 1 of the Federal Employers' Liability Act.

3. In failing to hold that Fritz-Rumer-Cooke was an independent contractor of the Railroad.

4. In failing to hold that as a matter of law respondent was *not* an "employee" of or "employed" by the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act.

5. In affirming the judgment of the District Court.

REASONS WHY CERTIORARI SHOULD BE GRANTED.

1. The Circuit Court of Appeals has erroneously decided an important question of Federal law. In determining, despite the circumstances of his injury, that as a matter of law respondent was an "employee" of or was "employed" by the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act because of the contract between the Railroad and Fritz-Rumer-Cooke in respect of other matters, the decision of the Circuit Court of Appeals establishes a potential and wholly unexpected liability under that Act on the part of the railroads of this country, including petitioner, to an incalculable number of employees of shippers who load carload freight.

2. The decision of the Circuit Court of Appeals is in probable conflict with the decisions of this Court in *Robinson v. Baltimore & Ohio Railroad Co.*, 237 U. S. 84; *Chicago,*

etc. Railway Co. v. Bond, 240 U. S. 449; *Wells-Fargo Co. v. Taylor,* 254 U. S. 175; *Linstead v. Chesapeake & Ohio Railway Co.,* 276 U. S. 28; *Hull v. Philadelphia & Reading Railway Co.,* 252 U. S. 475; *United States v. Silk,* Nos. 312, 673, October Term, 1946. In concluding that respondent was an employee of the Railroad, the Circuit Court of Appeals misapplied the principles announced in those cases for determining the persons who are "employees" within the meaning of Section 1 of the Federal Employers' Liability Act.

3. The decision of the Circuit Court of Appeals is in conflict with the decision of the Supreme Court of Ohio in the case of *Klar v. Erie Railroad Company,* 118 O. S. 612, certiorari denied 279 U. S. 818, and the Circuit Court of Appeals for the Third Circuit in *Docheney v. Pennsylvania Railroad Co.,* 60 F. (2d) 808.

ARGUMENT.

The Circuit Court of Appeals thought that the question was whether or not Fritz-Rumer-Cooke was an independent contractor of the Railroad. It examined the contract between them, concluded that Fritz-Rumer-Cooke was not an independent contrctor under it, and therefore held that *as a matter of law* respondent was an "employee" of the Railroad. This decision was wrong for two reasons. In the first place, the Court failed to recognize that in the circumstances of respondent's injury the effect of the contract between the Railroad and Fritz-Rumer-Cooke was not relevant to the issue of the Railroad's liability to respondent under the Federal Employers' Liability Act. In the second place, even on its assumption that the effect of the contract and the relationship under it were determinative, the Court erred in concluding that Fritz-Rumer-Cooke was not an independent contractor.

1. The contract between the Railroad and Fritz-Rumer-Cooke had nothing to do with this case because at

the time he was injured respondent was engaged as an employee of a shipper, with two other employees of the shipper, in loading the shipper's crane for shipment to the shipper's own storage yard in a nearby city. In holding that respondent was nevertheless an "employee" of the Railroad the Circuit Court of Appeals effected an altogether unwarranted enlargement of the scope of "employee" and "employed" as those terms are used in the Federal Employers' Liability Act—unwarranted either by precedent or policy, and in flat contradiction to the facts. The facts are decisive and should be examined in detail.

Within any conventional meaning of the word, respondent was an "employee" not of the Railroad but of Fritz-Rumer-Cooke. Fritz-Rumer-Cooke is a corporation, incorporated in 1911 in continuation of a prior partnership, and has been an established, privately-owned concern for 67 years (R. 41-42). Its business is heavy construction (R. 42). Among its customers are railroads, various cities, and the State of Ohio (R. 41). Respondent was hired by Fritz-Rumer-Cooke (R. 36). His wages and other terms and conditions of employment were fixed by Fritz-Rumer-Cooke (R. 36, 61-62). He was told what to do and when and how to do it by Fritz-Rumer-Cooke (R. 61-62). On his behalf, Fritz-Rumer-Cooke complied with the Ohio workmen's compensation statute (R. 42). After he was injured, respondent accepted a workmen's compensation award on the theory that he was an employee of Fritz-Rumer-Cooke (R. 42, 46). By the same token, respondent was not an "employee" of the Railroad. In the Federal Employers' Liability Act, "Congress used the words 'employee' and 'employed' * * * in their natural sense, and intended to describe the conventional relation of employer and employee." *Robinson v. Baltimore & Ohio Railroad Co.*, 237 U. S. 84, 94.

At the time of his injury, respondent was engaged in the work of Fritz-Rumer-Cooke (R. 26, 58, 63, 87). Under

the supervision of Fritz-Rumer-Cooke's yard superintendent, respondent was assisting two other Fritz-Rumer-Cooke employees in the loading of a crane which belonged to Fritz-Rumer-Cooke and was being returned to Fritz-Rumer-Cooke's main storage yard in a nearby city. The consignor of the shipment was Fritz-Rumer-Cooke. The consignee was Fritz-Rumer-Cooke. The Railroad had no more interest in shipment of the crane than it had (or has) in the shipment of a carload of wheat or telephone poles.[1] In loading the crane and using its own employees to do it, Fritz-Rumer-Cooke was doing just what (and nothing different than) any shipper of carload freight would do on its own spur track. A car inspector was present at the loading for a single and obvious purpose: to accept or reject the loaded car for shipment, that is, to determine whether or not it had been loaded in accordance with the loading rules of the Association of American Railroads (R. 27, 75, 87). That he advised about loading technique as the work progressed was merely a practical solution of a practical problem. Reloading was avoided by the informed advice of the inspector during the first loading.[2]

The presence of the inspector did not and could not change the essential character of the work in which respondent was engaged or the fact that respondent was an em-

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[1] The fact that Fritz-Rumer-Cooke could be reimbursed by the Railroad for the regular freight charges for moving the crane is without significance to the question whether or not respondent was an employee of the Railroad. For example, a railroad might contract to purchase rails f.o.b. mill to be used in extending its tracks and, as part of the bargain, agree to reimburse the shipper for freight prepaid from the mill to destination. But such an agreement surely would not give the employees of the rail manufacturer who loaded the rails the status of "employees" of the railroad for purposes of the Federal Employers' Liability Act.

[2] Respondent's case is not aided by anything the inspector may have said while Fritz-Rumer-Cooke loaded its crane. See *Standard Oil Co. v. Anderson*, 212 U. S. 215. If his statements prove anything, they establish that he was temporarily in the employ of Fritz-Rumer-Cooke.

ployee of Fritz-Rumer-Cooke, not the Railroad. Direct, uncontroverted testimony (R. 87) established what is a matter of common knowledge, that the loading of carload freight is a function not of the railroad but of the shipper.[3] In this case as in any case where a shipper proposes to ship carload freight, the time, place, and working conditions, even the facilities for loading, are fixed and controlled by the shipper. The shipper's employees do the work. In short, the shipper loads; the railroad transports.

These decisive facts should not be obscured by any contract or relationship in respect of other matters between the Railroad and Fritz-Rumer-Cooke. Neither the contract nor the relationship, whatever it was, had or has anything to do with the sole question in the case, the question whether in view of his status and the nature of his work at the time of the injury, respondent can be considered an "employee" of the Railroad, within the meaning of Section 1 of the Federal Employers' Liability Act.[4] There is nothing new or startling about focusing attention on respondent's status and the nature of the work in which he was engaged at the time he was injured. Far from being prohibited or only permitted, such an inquiry is required by the terms of the Act and has been made on many occasions. A familiar instance involves the question whether or not the plaintiff's

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[3] "The general rule in the United States is and long has been that shippers are required to load, and receivers to unload, carload freight. This rule is embodied in the consolidated classification, and applies generally throughout the country." *Loading and Unloading Carload Freight,* 101 I. C. C. 394, 396.

[4] It cannot be overemphasized that the inspector's presence had nothing to do with the contract between Fritz-Rumer-Cooke and the Railroad or the contract between the Railroad and the United States. So far as the contracts were concerned, the crane could have been left in the storage yard or loaded upside down. But the Railroad could not accept for movement a car which the shipper had improperly loaded. The inspector's relation to the loading of the crane was precisely what it would have been during the loading of tractors by employees of International Harvester Company.

duties at the time of the injury bore the statutory connection to interstate commerce. See *Shanks v. Delaware etc. Railroad Co.*, 239 U. S. 556. Another instance was presented in *Chesapeake & Ohio Railway Co. v. Bryant*, 280 U. S. 404, where the question was whether the plaintiff had or had not been discharged by the railroad prior to the time he was killed.

Nor is there anything novel or startling about the proposition that in view of respondent's status and the nature of the work in which he was engaged at the time he was injured, the contract or relationship between the Railroad and Fritz-Rumer-Cooke in respect of other matters was not relevant to the question whether or not respondent was an "employee" of the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act. The nature of the present case and the sweeping implications of the contrary view are more clearly apparent if all of the same facts are assumed with the single difference that the crane was being loaded in the main storage yard of Fritz-Rumer-Cooke for shipment to the Crestline storage area. In that case just as in this case, the status of Fritz-Rumer-Cooke was that of a shipper, and the status of respondent was that of a shipper's employee.[5] The effect of the contract between the Railroad and Fritz-Rumer-Cooke would have been a relevant inquiry only if respondent's injuries had been sustained in connection with work which

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[5] It so happens that at the time of the loading and of repondent's injuries, the contract between the Railroad and Fritz-Rumer-Cooke had been terminated and all operations under it had ceased. This fact particularly emphasizes the point that the loading of the crane was peculiarly the work of Fritz-Rumer-Cooke. But the result is no different if the same incident had occurred while the contract was in force and operations were being carried on under it. Even then, if Fritz-Rumer-Cooke had found that it did not need one crane in the performance of its contract and had concluded to return it to its main storage yard, the loading and shipment of the crane would be just as clearly and simply the loading by a shipper of its own goods for transportation by a common carrier.

Fritz-Rumer-Cooke was bound to perform for the Railroad under the contract. An instance where the inquiry was relevant, although the conclusion is not decisive of this case, is the case of *Cimorelli v. New York Central Railroad*, 148 F. (2d) 575.

The contrary view taken by the Circuit Court of Appeals of the effect of the contract or the relationship between the Railroad and Fritz-Rumer-Cooke produces an extraordinary consequence. For if respondent, while engaged as an employee of a shipper in loading the shipper's goods, was nevertheless an "employee" of the Railroad as a matter of law for the purposes of the Federal Employers' Liability Act, then the railroads in this country, including petitioner, have acquired by force of the decision below an incalculable number of "employees"—the employees of all shippers who load carload freight—and a potential, unexpected liability which Congress never intended to impose.

2. The Circuit Court of Appeals thought that the contract between the Railroad and Fritz-Rumer-Cooke was determinative. Finding that the contract was somewhat like the contract involved in *Cimorelli v. New York Central Railroad*, 148 F. (2d) 575, the Court concluded that its decision in the *Cimorelli* case required it to find that Fritz-Rumer-Cooke was not an independent contractor. Overlooking the decisive difference in the circumstances of the injuries in the two cases, the Court therefore held that as a matter of law respondent was an "employee" of the Railroad. For the reasons already stated, the Court never should have reached the question whether or not Fritz-Rumer-Cooke was an independent contractor of the Railroad in the respect of the work which it was bound to perform under the contract. But even on the Court's assumption that this was a proper inquiry, it reached an erroneous result. For, in concluding that Fritz-Rumer-Cooke was not an independent contractor, the Circuit Court of Appeals misapplied principles announced in several

decisions of this Court and reached a result which is in conflict with those cases, with a decision of the Supreme Court of Ohio, and with several decisions of lower Federal courts.

There is nothing in the formal contract between the Railroad and Fritz-Rumer-Cooke which supports the conclusion that Fritz-Rumer-Cooke was not an independent contractor of the Railroad. The contract is a carefully drafted document setting forth at length its purposes, the work to be done, the responsibilities of the parties, the reimbursement to be paid and the method of payment. The paragraphs describing in detail the work to be done are quoted in the opinion of the Court below. Fritz-Rumer-Cooke furnished "all superintendence, labor, tools, appliances, plant and materials" with certain exceptions set forth in the contract (Paragraph III, VI(a), R. 132, 133). Its employees were employed by it, paid from its own funds, discharged by it alone, and were "subject to its exclusive supervision, direction and control." Fritz-Rumer-Cooke, like many war contractors, was to be reimbursed on a cost-plus-fixed-fee basis. The contract provided that the cost of the work "shall **not** include the contractor's general supervision, general office expenses, general overhead nor interest charges." Not a single expenditure of Fritz-Rumer-Cooke had to be approved or even submitted in advance to the Railroad. Small tools and supplies "less their salvage value" were furnished by Fritz-Rumer-Cooke and became its property (VI 1 (e), R., 134).

Nor was there anything in the manner of performance of the contract which justified the conclusion that Fritz-Rumer-Cooke was not an independent contractor. As the opinion of the Circuit Court of Appeals describes, inside the Government storage yard the work of loading and unloading was carried on by employees of Fritz-Rumer-Cooke under the supervision of its yard foreman who hired and fired the men, directed the switch engines as to where to

place and pick up cars and "supervised the work." Orders of the Second Transportation Zone were relayed to the Fritz-Rumer-Cooke foreman by the Railroad's local freight agent. The freight was unloaded, stored and reloaded under Fritz-Rumer-Cooke's supervision. The work was performed in an isolated location away from the general railroad yard. Fritz-Rumer-Cooke's regular employees were not limited in their employment to the time required to complete the work at the Government storage yard and they were paid on a time and not a job basis.

In short, by the terms of the contract and the manner of performing it, Fritz-Rumer-Cooke was an independent contractor of the Railroad. In the last analysis, the Circuit Court of Appeals was diverted from this conclusion by the presence, at the loading, of the Railroad's car inspector. But his presence, like the loading itself, had nothing to do with the contract. As already stated in the preceding part of this argument, he was there for a purpose wholly unconnected with the contract, the purpose of determining whether or not Fritz-Rumer-Cooke loaded the crane in accordance with the loading rules of the Association of American Railroads. His relation to the loading was precisely what it would have been if employees of International Harvester Company had been loading tractors on a flat car. If his statements while the loading progressed establish anything, they establish that he became the temporary employee of Fritz-Rumer-Cooke. See *Standard Oil Co. v. Anderson*, 212 U. S. 215.

The decision of the Circuit Court of Appeals that Fritz-Rumer-Cooke was not an independent contractor is contrary to a number of decisions of this Court as well as decisions of lower Federal courts and the Supreme Court of Ohio. This Court has repeatedly determined that the benefits of the Federal Employers' Liability Act extend to railroad employees only, not to employees of an independent contractor. In *Robinson v. Baltimore & Ohio Railroad*, 237

U. S. 84, the Supreme Court first considered the meaning of the word "employee" as used in the Federal Employers' Liability Act and held that in view of the relation between the railroad and the Pullman Company, a Pullman porter was not a railroad employee within the meaning of the Act. In *Chicago, etc. Railway Co. v. Bond*, 240 U. S. 449, this Court found that a person loading and unloading coal under contract with the railroad was not a railroad employee within the meaning of the Act. In *Wells-Fargo Co. v. Taylor*, 254 U. S. 175, a similar result was reached as to an employee of a railway express company. Not only must the railroad employee be an employee in the conventional sense of the word, under these decisions, but it has been held that an employee of one railroad who is injured while performing services for a second railroad can recover under the Federal Employers' Liability Act from the second railroad only when the task he is performing at the time he is injured is properly the work of the second railroad. *Linstead v. Chesapeake & Ohio Railway Co.*, 276 U. S. 28. If the work that is being performed is the work of his regular employer, he cannot recover from the second railroad even though the work is being performed on the premises of the second railroad. *Hull v. Philadelphia & Reading Railway Co.*, 252 U. S. 475.

The decision of the Court below is also contrary to the decision of the Third Circuit Court of Appeals in the case of *Docheney v. The Pennsylvania Railroad Co.*, 60 F. (2d) 808, and the decision of the Supreme Court of Ohio in *Klar v. The Erie Railroad Co.*, 118 O. S. 612 (certiorari denied, 279 U. S. 818). In the *Docheney* case, the Court held that a brakeman employed by a steel company, although subject to rules and limited supervision of the railroad, was not an "employee" of the latter within Section 1 of the Federal Employers' Liability Act. In the *Klar* case, it was held that an employee of an equipment company which had contracted to repair freight cars of the railroad

was not an "employee" of the railroad for the purposes of the Federal Employers' Liability Act.[6] Similar cases involving the Federal Employers' Liability Act have been decided in the courts of states other than Ohio with results that are uniformly contrary to the decision of the Court below.[7]

3. The Court's failure to apply correctly the principles of the foregoing decisions stemmed from its failure to recognize that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act."[8] *United States v. Silk*, Nos. 312, 673, October Term 1946. In the words of this Court in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 124, the term "employee" as used in the Fair Labor Standards Act of 1938, "is not treated by Congress as a word of art having a definite meaning * * *. Rather it takes color from its surroundings in the statute where it appears * * * and derives meaning from the context of that statute, which

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[6] The subsequent broadening of the Safety Appliance Act to extend to non-employees of a railroad does not weaken the definition of "employee" adopted by the Court in the *Docheney* case. Nor does the holding in the *Klar* case that the employee was not engaged in interstate commerce detract from the holding that he was not an "employee" of the railroad.

[7] See, for example, *Taylor v. New York Central Railroad Company*, 62 N. E. (2d) 777; *Socony-Vacuum Oil Company v. Premeaux*, 187 S. W. (2d) 690, 698; *Drago v. Central Railroad of New Jersey*, 106 Atl. 803, certiorari denied, 251 U. S. 553; *Bugg v. Sanders*, 121 So. 410; *Polluck v. Minneapolis etc. Ry. Co.*, 166 N. W. 641.

[8] Thus, in a recent case involving the Carriers Taxing Act where there was a contract between a railroad and a stevedore company, it was held that the term "employee" was used in its conventional sense and that employees of the stevedore company who were unloading freight were not "employees" of the railroad. *Pennsylvania Railroad Co. v. United States*, 70 F. Supp. 595.

must be read in the light of the mischief to be corrected and the end to be attained."

The Federal Employers' Liability Act was passed by Congress in recognition of the dangerous nature of the railroad business. See *Tiller v. Atlantic Coast Line Railway Co.*, 318 U. S. 54. It was intended to abolish numerous defenses which had evolved from countless suits by an employee of a railroad against his employer. Its provisions have been broadly interpreted by this Court to insure a right of action for injuries sustained by employees of the railroad as a result of the railroad's negligence. But it has never been doubted, and this Court has consistently held, that the benefits of the Act were extended only to *employees* of the railroad. Indeed, the expression "independent contractor," applied to suits under the Federal Employers' Liability Act, is merely a concise manner of phrasing the conclusion that a particular plaintiff was the employee not of the railroad but of some one else.

The Federal Employers' Liability Act was intended to benefit those who, as employees of the railroad, were subject to the hazards of the business of the railroad. There is not a shred of evidence that Congress, in providing the benefits of the Federal Employers' Liability Act to employees of a railroad, intended to intrude on a host of "normal business relationships" through which the railroads were accustomed to obtain certain goods or services. See *United States v. Silk, supra.* It is difficult to see how it can be said that respondent, who was employed by Fritz-Rumer-Cooke and was injured while in the performance of Fritz-Rumer-Cooke's work, is within the class of persons whom the Federal Employers' Liability Act was intended to protect. This is particularly the case when it is remembered that Pullman porters, railway express employees, employees of coal shovelers and coal haulers, even railroad employees not engaged at the time of injury in the work of the railroad which they sued, have been held not to be

"employees" within the meaning of Section 1 of the Federal Employers' Liability Act.

CONCLUSION.

Whether the case be viewed as a suit by an employee of a shipper who was injured while loading the shipper's goods or as a suit where the question is whether or not Fritz-Rumer-Cooke was an independent contractor of the Railroad, the conclusion is the same: respondent was not an "employee" of the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX.

Federal Employers' Liability Act (45 U. S. C. 51)

Section 1.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Colmbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

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vs.

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BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 396.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE ROTH,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

QUESTION PRESENTED.

The petitioner has correctly stated the question. Was the respondent, when injured, an "employee" of the Railroad, so as to be entitled to the benefits of the Federal Employers' Liability Act?

COUNTER STATEMENT OF FACTS.

The Statement of Facts in the Brief of Petitioner is not only seriously inadequate but is also in certain respects inaccurate and misleading. We therefore present the following counter statement of facts.

The accident in which respondent suffered bodily injuries (the traumatic enucleation of one eye) took place on the afternoon of August 21, 1945 in a railroad yard at Crestline, Ohio.

This yard was built by, owned by, and operated by the Railroad in order to take care of Government shipments during the war.

The particular operation which was being carried on in this Railroad yard at the time respondent Roth was injured, was under the supervision and complete control of the Railroad.

Counsel for petitioner repeatedly assert in their Statement of Facts that the Railroad, as such, had little if anything to do with the operation of this yard, or the particular job which was being performed when the accident took place. The evidence is exactly to the contrary.

This yard was built by the Railroad at the request of the Government.

On May 7, 1942 (Ex. 3, p. 116) the Railroad sent a letter to the government confirming the fact that it had been

> "agreed that the Pennsylvania should proceed to prepare the storage yards at * * * Crestline, Ohio."

The Government, in the course of prosecuting the war, needed large storage yards where shipments of war material could be held *"in transit"* until there were available the necessary ships at the various ports to receive the material.

The Crestline yard was one of these *"in transit"* storage yards.

On the same day (to wit May 7th, 1942) a formal contract was executed between the Government and the Railroad by the terms of which eight such storage yards were provided for, for such "in transit" service. One of these was the Crestline yard with which we are concerned. This contract is in the Record as Exhibit 4, pp. 117-120.

By the terms of the contract it was provided that

> "heavy motor vehicles, and their equipment and supplies, and other property of the United States Government" could be "shipped in carloads to storage points named herein and there stored in transit."
>
> It was also provided that "Shipments must be consigned in care of the freight agent (of the Railroad) at the storage point * * * Shipments so held in stor-

age may be reconsigned to a final destination, or port of export * * * and readjustment of freight rates to the basis of rates applicable from point of origin to such final destination * * * will be made at the time shipment leaves the storage point."

The contract also required that the Railroad preserve "the identity of lading of each inbound car" while it was stored.

It set out the amount to be paid by the government to the railroad "for transit privilege" "which will be in addition to the transportation charge from point of origin to final destination."

It also set out the various charges for unloading from inbound cars; loading on out bound cars; and the additional rate for storage.

This was the service which the Railroad agreed to perform, upon a basis of charges which the Government agreed to pay.

The contract provided that it was made under authority of Section 22 of the Interstate Commerce Act, which authorizes railroads to make special rates to the Government. (See Appendix.)

A few days after the contract was executed (Ex. 6, p. 125), the Government shipped to the Crestline yard 1000 car loads of boxed Yellow trucks from Pontiac, Michigan, and 1500 car loads of boxed Studebaker trucks from South Bend, Indiana.

There were some supplemental letters and contracts between the Government and the Railroad which are not of great significance, except as they emphasize the fact that it was the *Railroad* (and the Railroad alone) which was dealing with the Government in the creation and operation of this Crestline yard.

For example, the original agreement (Ex. 4, p. 118) made it clear that the government material was to be received by and stored *by the Railroad.*

"When the property has been received in storage by the Railroad Company under this agreement, the Railroad Company, through its station agent, will issue * * *" its receipt for the property etc.

The Railroad agreed with the Government to build this storage yard, and to operate it.

But on March 1, 1944 (Ex. 9, p. 131) the Railroad entered into a contract with a corporation known as the Fritz-Rumer-Cooke Co., by the terms of which the Railroad attempted to delegate to Fritz-Rumer-Cooke Co., the operation of this Crestline yard.

There is nothing in the Record to indicate that the Government ever knew, or ever consented to this attempted delegation.

This contract between the Railroad and the Fritz-Rumer-Cooke Co. was on the basis of "*cost-plus,*" so called.

Almost every conceivable charge or expense was included in the bill which was sent to the Railroad, and the Railroad then reimbursed the Fritz-Rumer-Cooke Co. for all these expenses plus "a fee of 5% on * * * payroll cost of labor, a fee of 2½% on hire of trucks * * * a fee of 5% on the hire of all other equipment * * * and a fee of 8% on the net cost of materials purchased * * *"

The respondent, George Roth, was, in name, an employee and on the payroll of this contractor, Fritz-Rumer-Cooke Co.

What are the facts about the actual operation of this Crestline yard?

The brief of petitioner asserts that the entire operation was turned over to Fritz-Rumer-Cooke Company.

In the sense that Fritz-Rumer-Cooke Company acted as the Railroad's *agent* for the operation, that is true.

In the sense that the Railroad withdrew from all control and right of control, it is entirely incorrect.

The yard was on Railroad premises. (p. 18)

It was physically connected with the Railroad lines. This appears from the map, which was prepared by the Railroad (p. 161). The map bears this legend:

THE PENNSYLVANIA RAILROAD COMPANY

Western Region — Fort Wayne Division
P.F.W. & C. Ry. — Val. Sec. 3—Ohio

CRESTLINE, OHIO

FACILITIES FOR STORAGE OF FEDERAL EQUIPMENT

No person could enter the storage yard except by virtue of a pass which was issued by the Railroad. (p. 62.) This pass had to be surrendered every night to a Railroad officer, and secured each morning from the Railroad officer. (62.) Respondent was issued one of these passes by the Railroad, so that he could enter and work in the yard. (Ex. 25, p. 153.)

The Railroad agreed to provide a certain number of patrol officers to guard the entire yard. (See letters of May 19, 1942 and May 20, 1942, Exhibits 6 and 7, pp. 125, 127; and also contract of April 14, 1943, Ex. 8, p, 127.) The Railroad engines and crews moved in and out of the yard. (pp. 25, 77.)

Furthermore, the actual work which respondent was doing at the time he was hurt, was under the specific control of the respondent.

The accident came about in this manner.

When the European war was over, the Railroad exercised its rights to terminate its contract with Fritz-Rumer Cooke Co., and the latter was accordingly engaged in finishing its work, at the time of the accident. Some of the heavy machinery was being loaded upon a railroad car, and was being lashed securely for shipment.

To hold this machinery down upon the flat car, cables were used in a fashion that is generally known as the Spanish turnbuckle. That is, a length of steel cable was run through a stakeholder pocket on the side of the flat car,

run up through an opening in the machinery and then looped back upon itself. Two ends of the cable were clamped together so that the cable would then form a continuous loop. An iron bar was then inserted in a small loop of this cable and was turned until by the process of twisting, the cable was brought into terrific tension. When the cable could not be turned tighter, the men who were holding the twisting bar were ordered to force the end of the bar between two timbers which were spiked to the bed of the car. The men were then told that the job was completed. The bar, however, was insecure. A few moments later, it slipped out of its socket, and being under great tension, spun around and one end struck the plaintiff under the left eye, tearing the eye out of its socket.

The Record shows plainly that this whole process was supervised and controlled *by the Railroad.*

John F. Blancett, who was a car inspector for the Railroad, testified that he had the right "to direct the manner in which they (the Fritz-Rumer Cooke Co. employees) load" the cars (p. 28); that the Railroad agents received all orders for the unloading or reshipment of freight from the yard (pp. 28, 29); that the Railroad guards patrolled the yard, and maintained a guardhouse at each corner of the yard (p. 29), that he (Blancett) examined every empty freight car coming to the yard, to determine whether it was suitable to be used; and after it had been loaded, he checked every car to see if the load "was properly staked and affixed to the car." (p. 30.)

The Railroad provided the *lights* in the yard, and a Railroad man was in charge of the *water supply and the fire hydrants.* (p. 33.)

When the accident happened to respondent, Blancett (this Railroad inspector) was engaged in supervising the job.

When the men had tightened the loop of cable sufficiently, he admitted, "I told them that was enough." (p. 32.)

"Q. When they had the cable twisted so that it was taut, you said, 'That's tight enough' and then they were going to pull the end of the bar and lash the end of the bar so the table could not untwist?

A. That is right." (p. 34.)

To the same effect see testimony of Respondent. He testified that Blancett gave orders as to "how" the machinery was to be loaded. (p. 63.)

"Q. • • • Who told you how to load that crane?

A. Mr. Blancett.

• • • • •

Q. • • • Who told you to get the cable and twist the cable?

A. Blancett.

• • • • •

Q. Who decided when that cable had been twisted tight enough?

A. John Blancett • • •.

• • • • •

Q. • • • What did he say?

A. • • • He said 'Well, that is all. Leave it there. That is good enough.' " (p. 64.)

When the case was concluded, the District Court (in the absence of the jury) made this observation about the manner in which the Railroad had this work done.

"I personally think it was a very negligent way of loading that crane. If I were sitting on the jury, I certainly would think it was an antiquated, negligent manner of loading the crane." (97.)

It is obvious, therefore, that plaintiff would have had a right to recover, quite irrespective of the Federal Employers' Liability Act.

Even if he had been only an invitee he could have recovered because of the negligence of Blancett, the Railroad's inspector whose negligence resulted in the injuries to respondent.

At any rate, the iron bar, which was used at the Railroad's orders, and used in the manner dictated by the Railroad, spun around and injured the respondent.

Respondent filed an action against the Railroad, and set up two separate and alternative causes of action.

As the first cause of action, he alleged that he was in fact an employee of the Railroad even though in name, an employee of Fritz Rumer Cooke Co., and that he was therefore entitled to the benefits of the Federal Employers' Liability Act.

As his second cause of action he alleged that if, in fact, he was not an employee of the Railroad, he was an invitee upon the premises of the Railroad, and was entitled to recover because of the negligence of the Railroad, which through its agent Blancett, had supervised the loading of the machinery, and had negligently ordered the job done in the very manner which resulted in the serious injury to respondent.

At the trial, the District Judge held that under the undisputed facts respondent was an employee of the Railroad, and submitted the case to the jury only upon the first cause of action.

There was a general verdict for respondent.

Motions for New Trial, and for Judgment notwithstanding the verdict were filed, and overruled.

Upon appeal to the Sixth Circuit Court of Appeals, the judgment was affirmed.

The Opinion is reported in 163 F. 2d 161 (Advance sheets for October 6, 1947).

ARGUMENT.

The central proposition of the petitioner, which is repeated many times, and on which it predicates its claim for certiorari, is that

> "The decision of the Circuit Court of Appeals establishes a potential and wholly unexpected liability under that Act (the Federal Employers' Liability Act) on the part of the railroads of this country, * * * to an incalculable number of employees of shippers who load carload freight." (Their Brief, p. 4.)
>
> "The loading of carload freight is a function not of the railroad but of the shipper." (Their Brief, p. 8.)

Petitioner entirely misconceives the problem with which the lower courts were dealing in this case; and therefore has argued a case which is not presented by the record.

The respondent has never claimed—and neither of the lower courts has held—that an ordinary shipper while loading railroad cars, can bring his employees under the protection of the Federal Employers' Liability Act.

In our case at bar, we are dealing with a very different situation.

We are dealing with a *Railroad* which received goods *in transit,* as a *Railroad,* stored them as a *Railroad,* and eventually sent them forward to their ultimate destination as a *Railroad.*

We assume that it is elementary that a Railroad can not delegate away any of its essential functions *as a Railroad* to an independent contractor, and thus escape the obligations of the Federal Employers' Liability Act.

That is what is clearly provided in Section 5 of the Federal Employers' Liability Act. (Title 45, Sec. 55, U. S. C. A.) (See Appendix.)

May a Railroad for example delegate to an independent contractor, the repair of its right of way and thus deprive the men doing that work of their rights under the Act? In *Erie R. R. Co. v. Margue* (23 F. 2d 664—6th Circ.),

it was held that despite such attempted delegation, the workmen were still entitled to the benefits of the Act.

Was the work which was attempted to be delegated to the Fritz-Rumer-Cooke Co. an essential part of the petitioner's work *as a Railroad?*

The documents which are in evidence do not permit of any doubt on that point.

For example the original contract between the Government and the Railroad provided that when the goods were received and stored *in transit* and subsequently sent on to the port of final destination, the Government could only be charged for the entire haul, a rate equal to the amount which could be charged from the point of original shipment, to the point of final destination.

In other words, if the goods came from A to Crestline where they were stored in transit, and then were sent on to B as the port of final destination, the Railroad could only charge the through rate from A to B, and not the sum of the two separate rates for the two separate hauls from A to Crestline, and Crestline to B. This is specifically set out in paragraph 3 of the original contract, p. 117.

Furthermore, counsel for petitioner seem to overlook the fact that *storage* is one of the essential services performed by a railroad.

This is pointed out very clearly in the Interstate Commerce Act.

All of the contracts emphasize the fact that they are made subject to Section 22 of that Act, which permits special rates to the Government.

In Section 1 (3) (a) of the Interstate Commerce Act (Title 49, Sec. 1, U. S. C. A.) the definitions emphasize the point which we are discussing:

> "The term *'railroad'* as used in this chapter *shall include* * * * all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property desig-

nated herein, including *all freight depots, yards, and grounds, used* or necessary *in the transportation* or delivery *of any such property.*

The term 'transportation' as used in this chapter *shall include* * * * *all instrumentalities and facilities* of shipment or carriage, irrespective of ownership or of any contract express or implied, for the use thereof, *and all services in connection with* the receipt, delivery, elevation, and *transfer in transit,* ventilation, refrigeration or icing, **storage,** and handling of *property transported."* (Emphasis ours.)

This section has been considered repeatedly by the Supreme Court of the United States, and the services of a railroad in furnishing *"storage"* has been held to be a part of *"transportation."* See, for example, *Cleveland etc. Ry. Co. v. Dettlebach,* 239 U. S. 588, 60 L. Ed. 453; *Southern R. R. Co. v. Prescott,* 240 U. S. 632, 60 L. Ed. 836; *R. R. Retirement Board v. Duquesne Warehouse Co.,* 326 U. S. 446; 90 L. Ed. 192.

In addition to the foregoing, we call attention to the 1939 Amendment of the Federal Employers' Liability Act.

Whatever might have been the case before that Amendment, we submit that the language of that amendment is so broad that the work which respondent was hired to do in the storage yard, was clearly part of the Railroad's work, and within the protection of the Act.

"* * * Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Title 45, sec. 51, U. S. C. A.)

CONCLUSION.

The respondent has suffered severe injuries as the direct result of the negligence of the Railroad.

At the time he was injured, he was engaged as a workman in a railroad yard where goods were received, stored in transit, and reconsigned to their final destination. This was (we submit) "railroad" work.

The contract with the socalled independent contractor was a transparent device to avoid the obligations of the Federal Employers' Liability Act. This was prohibited under Section 5 of that Act.

The decisions of the lower courts are clearly correct, and we submit that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Section 22 of The Interstate Commerce Act.

(Title 49, Sec. 22, U. S. C. A.)

"Sec. 22. Nothing in this chapter shall prevent the carriage, *storage,* or handling of property free or at reduced rates for the United States * * *." (Emphasis ours.)

Section 1 of The Interstate Commerce Act.

(Title 49, Sec. 1, U. S. C. A.)

"Sec. 1. (1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of * * * property wholly by railroad, or partly by railroad and partly by water when both are used under a common control * * * etc.

* * * * *

(3) Definitions. The term 'common carrier' * * * shall include * * * all persons * * * engaged in such transportation * * * as common carriers for hire * * *.

The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

The Federal Employers' Liability Act.

"Sec. 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of the next of kin depending upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its car, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Title 45, Sec. 51, U. S. C. A.)

* * * * *

"Sec. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." (Title 45, Sec. 55, U. S. C. A.)

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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 396.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE ROTH,
Respondent.

REPLY BRIEF

In Support of the Petition for a Writ of Certiorari To the United States Circuit Court of Appeals For the Sixth Circuit.

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REPLY BRIEF
In Support of the Petition for a Writ of Certiorari
To the United States Circuit Court of Appeals
For the Sixth Circuit.

The brief in opposition to the petition for a writ of certiorari compels the following analysis of respondent's position:

1. The Railroad was prohibited by Section 5 of the Federal Employers' Liability Act from making the work performed by Fritz-Rumer-Cooke the subject of an independent contractor relationship.

2. Although he was an "employee" of Fritz-Rumer-Cooke in any conventional meaning of the word, respondent was an "employee" of the Railroad under the Federal Employers' Liability Act for the reason that the Railroad retained control of the work covered by the contract either (a) because that was the effect of the contract as a matter of law, or (b) because that was the result as a matter of law of the presence and statements of the Railroad's car inspector while the crane was being loaded.

In passing, one erroneous inference conveyed by the undocumented Counter Statement of the Facts should be cor-

rected. By stating (Br. 2) that in 1942 the Railroad agreed with the Government to establish the storage yard and (Br. 4) in 1944 contracted for the operation of the yard by Fritz-Rumer-Cooke, respondent implies that the Railroad itself operated the yard during the period intervening between those dates. The fact is that the Railroad never operated the storage yard and that in the intervening period Fritz-Rumer-Cooke had operated it under a prior contract (R. 43-44). Certain other assertions in the Counter Statement of Facts which are fundamentally conclusions of law need not be individually noticed.

1. The Contract and Section 5 of the Federal Employers' Liability Act.

Respondent's main contention now seems to be that the contract between the Railroad and Fritz-Rumer-Cooke was prohibited by Section 5 of the Federal Employers' Liability Act. At least all of respondent's argument, except that part which is included in the Counter Statement of Facts, is addressed to this point and is intended to sustain the judgment on that ground.

But if the decision of the court below is to be taken as a holding, in effect, that the contract between the Railroad and Fritz-Rumer-Cooke was forbidden by Section 5 of the Federal Employers' Liability Act, then the decision presents a serious and important question which should be considered by this Court, particularly in view of this Court's decisions in *Robinson v. Baltimore & Ohio Railroad Co.*, 237 U. S. 84 and *Chicago etc. Ry. Co. v. Bond*, 240 U. S. 449, where the same claim was expressly made and expressly denied. See also *Wells Fargo Co. v. Taylor*, 254 U. S. 175. Moreover, if the decision is to be sustained on this ground, then the decision is directly in conflict with the contrary decision on almost identical facts of the Court of Errors and Appeals of New Jersey in *Drago v. Central Railroad Co.*, 93 N. J. Law 176, 106 Atl. 803, certiorari

denied, 251 U. S. 553, where it was also claimed that the contract was forbidden by Section 5 and the claim was expressly denied on the authority of the *Bond* and *Robinson* cases.

In this case, the contention that the Railroad's contract with Fritz-Rumer-Cooke was banned by Section 5 is answered by the language of Section 5 itself. There is not the slightest basis in the record for supposing that "*the purpose or intent*" of the contract was to enable the Railroad "*to exempt itself from any liability*" created by the Federal Employers' Liability Act. Fritz-Rumer-Cooke was an old, privately owned, well established company which numbered various cities and the State of Ohio among its customers. It was not a company "largely organized and controlled" by former employees of the Railroad. See *Erie Railroad Co. v. Margue*, 23 F. (2d) 664. Nor was the work covered by the contract work which the Railroad was *required* to do *itself*, either by its contract with the United States or by Section 22 of the Interstate Commerce Act.

The question is not whether a railroad *could* have done this work itself, or *had* done it on occasion. Apart from the fact that there is no evidence to either effect in the record, the question is whether petitioner was *prohibited* by Section 5 from contracting to have Fritz-Rumer-Cooke do it. The decisions clearly answer this question in the negative.

In two of the three cases involving independent contractors decided by this Court, the claim was made that the contract in suit violated Section 5 of the Act. In both cases the claim was denied. *Robinson v. Baltimore & Ohio Railroad Co.*, 237 U. S. 84; *Chicago etc. Ry. Co. v. Bond*, 240 U. S. 449; see also *Weds Fargo Co. v. Taylor*, 254 U. S. 175. In *Drago v. Central Railroad Co.*, 93 N. J. L. 176, 106 Atl. 803, certiorari denied, 251 U. S. 553, the railroad contracted with a stevedoring company engaged generally in the stevedoring business to load and unload railroad cars at

a waterfront terminal. The court properly concluded that the stevedoring company was an independent contractor and that Section 5 was not intended to forbid such an arrangement. Its decision was expressly grounded on the decisions of this Court in the *Robinson* and *Bond* cases.

There is not the slightest evidence that in enacting Section 5, Congress "intended to change normal business relationships through which one business organization obtained the services of another" to perform a service like that involved in the contract with Fritz-Rumer-Cooke. See *United States v. Silk,* No. 312, October Term, 1946, decided June 16, 1947. On the contrary, it must be assumed that Congress intended to leave these "normal business relationships" alone.

2. Respondent as an "Employee" of the Railroad.

(a) *The Contract.* It is plain that in respect of the work covered by the contract, Fritz-Rumer-Cooke was an independent contractor. The evidence and the decisions cited in petitioner's brief in support of the petition conclusively show that Fritz-Rumer-Cooke was an independent contractor, both by the contract and by the manner of performing it. This is true whether Fritz-Rumer-Cooke's status as an independent contractor be tested by the decisions of this Court under the Federal Employers' Liability Act (see *Robinson v. Baltimore & Ohio Railroad Co.,* 237 U. S. 84; *Chicago etc. Ry. Co. v. Bond,* 240 U. S. 449; *Wells Fargo Co. v. Taylor,* 254 U. S. 175), under other Federal statutes (see *United States v. Silk,* No. 312, and *Harrison v. Greyvan Lines, Inc.,* No. 673, October Term, 1946) or under the common law (see *Standard Oil Co. v. Anderson,* 212 U. S. 215).

(b) *The Car Inspector.* The important fact, however, is that in this case neither the contract between Fritz-Rumer-Cooke and the Railroad nor the contract between the Railroad and the Government had or has anything to

do with the question whether or not respondent was an "employee" of the Railroad within the meaning of Section 1 of the Federal Employers' Liability Act. At the time of respondent's injuries, the contract between the Railroad and Fritz-Rumer-Cooke had been terminated and all operations under it had ceased (R. 80-81; Ex. C). Fritz-Rumer-Cooke was not performing any work covered by the contract when it loaded its own crane for shipment to its own storage yard in a nearby city (R. 58).

Neither the Railroad nor the Government had any interest in this operation, by the contracts or otherwise. So far as the contracts were concerned, the crane could have been left in the storage yard, dismantled and sold for scrap, or moved by truck or under its own power to a point which could not be reached by railroad. The Railroad's car inspector was present during the loading of Fritz-Rumer-Cooke's crane for just one purpose—to determine whether the loaded flat car complied with the loading rules of the Association of American Railroads. The car inspector was present at the loading of Fritz-Rumer-Cooke's crane in precisely the same capacity in which he would have been present at the loading of tractors by employees of International Harvester Company or any other company which had no contract whatever with the railroad. The car inspector was present for the convenience of the shipper—Fritz-Rumer-Cooke—to avoid the necessity of reloading by employees of Fritz-Rumer-Cooke in case the first loading did not comply with the loading rules of the Association of American Railroads. If his statements or conduct proved anything, they proved that the car inspector was temporarily in the employ of Fritz-Rumer-Cooke. See, for example, *Standard Oil Co. v. Anderson*, 212 U. S. 215; *Linstead v. Chesapeake & Ohio Ry. Co.*, 276 U. S. 28.

From the foregoing, it is apparent that if the decision of the court below is to be taken as a holding, in effect,

that the Railroad's contract with Fritz-Rumer-Cooke was forbidden by Section 5 of the Federal Employers' Liability Act, then it presents a serious and important question which should be reviewed by this Court, for such a decision is in conflict with holdings of this Court and should be reversed. In any other view, the decision is similarly wrong and should be reviewed and reversed by this Court for the reasons stated in the petition for a writ of certiorari.

Respectfully submitted,

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